Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

MICHAEL D. GREGORY,

Petitioner,

v.

CINCINNATI INCORPORATED
and ADDY-MORAND MACHINERY
COMPANY

Respondents.

On Petition For A Writ of Certiorari To
The Michigan Supreme Court

PETITION FOR WRIT OF CERTIORARI

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June 27, 2000

QUESTION PRESENTED

1. Whether Gregory Was Deprived Of His Constitutional Right To The Benefits Of Verdicts And Judgments Of Trial By Jury When The State Of Michigan Appellate Courts Twice Reversed Jury Verdicts And Judgments In Gregory's Favor And Ordered As A Matter Of law The Entry Of A Judgment In Favor Of Defendants In A Factual Disputed Products Liability Case?

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On Petition For A Writ of Certiorari To
The Michigan Supreme Court

PETITION FOR WRIT OF CERTIORARI

The petitioner Michael D. Gregory respectfully prays that a writ of certiorari issue to review the judgment of the Michigan Supreme Court entered in this proceeding on March 29, 2000.

OPINIONS BELOW

The Order and judgment of the Michigan Supreme Court is unpublished and appears in Appendix A hereto. The Order of the State of Michigan Court of Appeals denying Gregory's motion for rehearing and its unpublished opinion reversing the jury's verdict and judgment in favor of Gregory appear in Appendix B and Appendix C hereto. The opinions of the Michigan Supreme Court and the State of Michigan Court of Appeals reversing the first jury's verdict in this same case are published as Gregory v. Cincinnati Inc., 202 Mich. App. 474, 509 N.W. 2d 809 (1993), aff'd 450 Mich 1, 538 N.W. 2d 325 (1995).

JURISDICTION

The final order of the Michigan Supreme Court was entered on March 29, 2000 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Both federal and state constitutional provisions are involved. The Fifth and Seventh Amendments to the Constitution of the United States preserve to a litigant, such as Gregory, the right to the benefits of a "trial by jury", to due process and equal protection of the law. In pertinent parts, the State of Michigan Constitution provides at Section 14 as follows: "The right of trial by jury shall remain . . . . In all civil cases tried by 12 jurors a verdict shall be received when 10 jurors agree." M.C.L.A. Const. Art. 1, § 14.

STATEMENT OF THE CASE

This is a products liability case that has been twice tried to different juries where favorable verdicts and judgments have been returned and entered for Petitioner Michael Gregory (hereafter "Gregory" or "Plaintiff"). In the first trial, the jury found for Gregory and against both Defendants, awarding Gregory damages of $1,000,000.00. Gregory v. Cincinnati, Inc., 509 N.W. 2d 809, 810 (Mich. App. 1993).

Defendants appealed the judgment entered on the first jury verdict to the Michigan Court of Appeals. A divided Court of Appeals ruled that the judgment in favor of Gregory had to be reversed because Michigan law did not recognize a post-manufacturing, post-sale duty to cure defects in a product. Id. Gregory appealed to the Michigan Supreme Court the Court of Appeals' decision nullifying the $1.000,000.00 jury verdict in his favor. In August 1995, a divided Michigan Supreme Court issued a decision affirming the Court of Appeals ruling. Gregory v. Cincinnati, 538 U.S. 2d 325 (1995).

Based on the Michigan appellate courts rulings, the case was remanded for a retrial limited to Gregory's design defect theory. The evidence presented during the second trial on Gregory's negligent design claim was virtually identical to that presented at the first trial. Following the close of proofs, the jury concluded that both Defendants were liable for Gregory's injuries, i.e., Defendant Addy-Morand was liable for breaching an implied warranty and Cincinnati for its negligence in

manufacturing and selling the machinery without adequate safety features. The jury further determined that Defendants' act were the proximate cause of Gregory's injuries. Finally, the jury reduced its award to Gregory by fifty-one percent after finding Gregory comparatively negligent.

Following the second jury verdict in Petitioner's favor, the trial court denied Defendants' motions for judgment notwithstanding the verdict and/or for a new trial.

As a result of Defendants' second appeal to the Michigan Court of Appeals, a divided court ruled in an unpublished opinion that Defendants were entitled to judgment notwithstanding the verdict. Appendix C. In its divided opinion, the Court of Appeals majority rejected as a matter of law each of the four separate theories of liability advanced by Gregory at trial. Gregory's Motion for Reconsideration was denied by a divided court. Appendix B. Gregory's Delayed Application for Leave to Appeal to the Michigan Supreme Court was denied by a divided court. Appendix A.

STATEMENT OF THE FACTS

Michael Gregory was employed by Sheet Metal Industries of Melvindale, Michigan, as a journeyman press brake operator. On May 19, 1986, Gregory sustained a hand-crushing injury while using the series 9 press brake designed and manufactured by Defendant Cincinnati Incorporated (hereafter "Cincinnati") and sold by Defendant Addy-Morand Machinery company (hereafter "Addy-Morand"). The injury subsequently led to the amputation of several of Gregory's fingers and the thumb on his left hand. Gregory was required to undergo over a dozen operations and extensive, painful therapy.

REASONS FOR GRANTING THE WRIT

At the core of this case is Gregory's constitutional right to the benefits of a trial by jury, due process and equal protection of the law that were twice usurped below: first, by the State of Michigan appellate courts reversing an initial jury verdict and judgment in his favor; and second, by the State of Michigan appellate courts reversing a second jury verdict and

judgment in his favor with no further opportunity for a jury to resolve the factual disputes between the parties. See generally, Schofield, New Trials And The Seventh Amendment - Slocum v. New York Life Insurance Co., 8 ILL. L.Rev. 287 (1913).

At each phase of this case long procedural history through the Michigan appellate courts, there has never been a unanimous opinion by the appellate courts to deprive Gregory of the benefits of his favorable jury verdicts and judgments. In fact, Petitioner Gregory maintains that the dissenting opinions set forth by the appellate judges who have opposed the actions of the Michigan Court of Appeals and Michigan Supreme Court in depriving Petitioner Gregory of the benefits of his right to trial by jury have succinctly set forth persuasive reasons for granting this writ for certiorari. See, Gregory v. Cincinnati, 509 N.W. 2d at 815 (Murphy, J., dissenting); Gregory v. Cincinnati, 538 N.W. 2d 325, 340 (Cavanagh, J., dissenting) and (Levin, J., dissenting in part). See also, Gregory v. Cincinnati, (Cavanagh, dissenting). Appendix C at App. 14 (hereto). See also,

Appendix A hereto, Justices Cavanagh and Kelley voting to hear appeal to Michigan Supreme Court.

Petitioner will not burden this petition by repeating argument for granting this writ of certiorari that are better made by the dissenting judges at each step of this case's history before the Michigan appellate review process. However, Petitioner will highlight why the majority opinions in this case's history before the Michigan appellate courts have demonstrated a denigration of the role of the jury in making credibility determinations, weighing of the evidence and the drawing of legitimate inferences from the facts of the disputed record.

I. Gregory Was Deprived Of His Constitutional Right To The Benefits Of Verdicts And Judgments Of Trials By Jury In A Factual Disputed Products Liability Case

This Court has made it clear that the role of judges is limited in matters that are jury functions during a trial. See generally, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of evidence,

and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict."). Here, the Michigan appellate courts are internally divided because it is obvious that the majority in each instant has grossly overstepped the limited judicial role accorded judges and have invaded the province of the jury. This overstepping by the majority has deprived Petitioner of both federal and state constitutional rights that must not be allowed to stand.

A. The State of Michigan Court Of Appeals' Decision Reversing The Jury's Verdict and Trial Court's Judgment In Gregory's Favor Denigrates The Roles Of The Jury And The Trial Court

In Petitioner Gregory's original action, he was proceeding against Defendant Cincinnati and Addy-Morand on two general theories: (1) the press brake, which was sold to Gregory's employer, was defectively designed; and (2) that the Defendants were negligent in their post-sale conduct in failing

to repair or recall the press brake. After Defendants appeal the $1,000,000.00 verdict in Gregory's favor, the Court of Appeals reversed the $1,000,000.00 judgment in Gregory's favor by ruling that Michigan law did not recognize a post-manufacturing, post-sale duty to cure defects in a product. Gregory v. Cincinnati, Inc., 509 N.W. 2d 809 (1993). However, in the course of its first opinion, the Court of Appeals acknowledged that there may have been sufficient proofs to support a jury verdict on Gregory's negligent design theory. Nevertheless, the Court of Appeals reversed the entire first judgment because of the injection at trial of evidence and arguments relating to the Defendants' post-sale duty. The Court of Appeals language is instructive:

> The effect of injecting the continuing-duty theory into this trial was to expand the scope of the defendants' liability beyond that recognized in this state. *Even though there may have been sufficient evidence on the record to conclude that defendants may have known the*

> *hazard before manufacturing and marketing the product,* we cannot ascertain whether jury imposed liability on that basis. Id, p. 484 (emphasis added).

The Court of Appeals' decision nullifying the first jury's verdict in favor of Gregory was appealed to the Michigan Supreme Court. In August, 1995, the Michigan Supreme Court issued a decision affirming the first Court of Appeals ruling. Gregory v. Cincinnati, Inc., 450 Mich. 1; 538 N.W. 2d 325 (1995). The Michigan Supreme Court, like the Michigan Court of Appeals, held that the introduction of evidence and argument with respect to the Defendants' post-sale negligence was improper under Michigan law. However, like the Court of Appeals, the Michigan Supreme Court acknowledged that there was sufficient evidence to support Plaintiff's alternative basis for liability - the defective design claim:

> In light of the foregoing, we review whether the error in this case requires reversal. We note at the outset that there was some proof offered of negligent design

> as of 1964. *The only question is whether, as defendants contend, the continuing duty theory and its accompanying evidence tainted this otherwise permissible finding of negligence.* We hold that it did. Id. at 29-30 (emphasis added).

Based on the Supreme Court's first ruling, the case was remanded for a retrial limited to Gregory's design defect theory. Plaintiff's expert at the second trial was Dr. Paul Youngdahl, a mechanical engineer and retired University of Michigan professor, the same expert who had testified at Gregory's original trial. The testimony presented at the second trial with respect to Gregory's negligent design claim was virtually identical to that which was brought forward at the first trial.

Dr. Youngdahl testified that the press brake on which Gregory was injured was defective when it was designed, manufactured and sold because it lacked safety devices available in 1964, which would have eliminated the hazards posed by the machinery. Plaintiff further produced evidence that his injury

occurred as a consequence of the absence of such safeguards. Dr. Youngdahl identified four distinct design or safety features which would have prevented Gregory's injuries. Dr. Youngdahl focused his testimony on two main design defects: (1) the failure to safeguard the mechanical foot pedal used to activate the press brake, and (2) the failure to safeguard the press brake's point of operation through the use of barrier guards. Moreover, Dr. Youngdahl also discussed in his testimony the feasibility of a presence sensing device which could have been incorporated into the machine or the use of dual palm buttons in conjunctions with a foot pedal control. Dr. Young testified that this accident would have been avoided if these safeguards had been present.

At trial, it was undisputed that Gregory's injuries occurred in the unguarded point of operation. When a piece of metal popped out of the press brake and fell to the floor, Gregory bent down to pick it up, inadvertently placing his left hand in the unguarded "point of operation" area. The testimony indicated that he unintentionally depressed the foot pedal as he

returned to an upright position after picking up the fallen piece of metal, accidentally activating the press brake. Defendants' unguarded press brake crushed Gregory's thumb and three of the fingers on his left hand.

Evidence was adduced at trial that the hazard of having fingers and hands crushed in unguarded points of operation and the danger of unguarded foot pedals had been recognized in the metal working industry since at least 1896. Press-Working of Metals, by Oberling Smith (1st ed. 1868), pp. 235-236. Moreover, the National Safety Council ("NSC"), the U.S. Department of Labor, and authors of treaties on machine design have repeatedly published warnings about the hazards of unguarded points of operation to the hands and fingers of operators and the hazards presented by unguarded foot pedals. Plaintiff also produced evidence indicating that Cincinnati had noticed that the most common cause of accidents and injuries to press operators is from inadvertent placement of hands into the

machine's point of operation while leaning to pick up something or when distracted.

Dr. Youngdahl testified that the standard of care required that the point of operation and the foot pedal be guarded on heavy machinery such as the press brake in question. Dr. Youngdahl testified in substantial detail about the alternative means of guarding the press brake, including the system recommended by the National Safety Council (NSC) for the operation of mechanical press brakes described in its 1950 "Press Brakes" Date Sheet.

Dr. Youngdahl testified that point of operation and foot pedal guarding systems had been advanced by the NSC at least fourteen years before the press brake in question was sold by the Defendants. The guarding system proposed by the NSC involved two-hand palm button controls to position the ram to a point where there was no clearance for the hand or fingers and then the use of a properly guarded foot pedal to make the actual bend in the metal. Dr. Youngdahl indicated that this type of

guarding system was a safe, effective, feasible and economic means of guarding the point of operation and would have prevented Gregory's injury. Dr. Youngdahl also testified that the press brake on which Gregory was injured was without proper guarding of the point of operation or the foot pedal and that these defects in design caused Gregory's injury.

The Defendants offered testimony by Dr. Dennis Cloutier, an employee of Cincinnati and its Project Safety Coordinator. Mr. Cloutier, who is not an engineer, testified that the machine sold to Sheet Metal Industries in 1964 was not defective. Mr. Cloutier testified that it was not practical to guard the point of operation of a mechanical press brake due to the variety of jobs done on the machine. He testified that guarding of the foot pedal was unnecessary because of its location and the amount of pressure required to depress the foot pedal.

The Defendants offered the expert testimony of Donald Wandling, a licensed engineer. Mr. Wandling also testified that

the press brake was not defective and that point of operation guarding proposed by Plaintiff's expert, Dr. Youngdahl, was not feasible because of the various jobs performed on the machine.

The Defendants further introduced the testimony of Ted Korth, a former press brake operator who worked at the shop where Gregory was injured. Mr. Korth stated that the press brake could not be effectively guarded by any of the methods suggested by the National Safety Council and Dr. Youngdahl. Mr. Korth admitted, however, that he was not an expert in machine design and that he did not consider himself to be an expert on the principles of press brake guarding. He stated that he was not a certified member of the NSC, but that its recommendations would carry a lot of weight with him.

Following the close of proofs, the jury concluded that both Defendants were liable for Gregory's injuries; Addy-Morand for breaching an implied warranty and Cincinnati for its negligence in manufacturing and selling the machinery without adequate safety features. The jury further concluded that

Defendants' acts were the proximate cause of Gregory's injuries and returned a verdict in Plaintiff's favor.

Based on the genuinely disputed nature of the issues in this case, Petitioner had a constitutional right to a jury trial. See, Great Lakes Gas Transmission Limited Partnership v. Markel, 226 Mich. App. 127, 573 N.W. 2d 61, 64 (1998) ("[T]he core element of the right -- to present a claim to a jury and have the jury determine issues of fact -- is the same no matters its origins."). While it is settled that the Seventh Amendment to the United States Constitution does not confer a right to trial by jury in state-court civil cases, the Courts in the State of Michigan still look to federal precedent in determining whether a party's right to a jury trial has been infringed. Id. It was improper and inconsistent with the earlier rulings of the Michigan Court of Appeals and Michigan Supreme Court, for the second jury verdict in Petitioner's case to have been reversed as a matter of law with no opportunity for a new trial. See, Hetzel v. Prince William County, Virginia, 523 U.S. 208 (1998).

B. The State Of Michigan Court Of Appeals, In Reversing The Trial Court Judgment In Petitioner's Favor, Improperly Weighed The disputed Evidence, Improperly Made Credibility Determinations And Improperly Drew Inferences From The Disputed Facts

For the reasons set forth in the dissenting opinion of Judge Mark J. Cavanagh, Petitioner maintains the majority of the Michigan Court of Appeals have acted improperly and deprived him of his right to a jury trial. Appendix C at App. 14. See, Beacon Theaters, Inc. v. Westover, 359 U.S. 500 (1959).

C. The Michigan Supreme Court Deprived Petitioner Of The Benefits Of His Constitutional Rights By Refusing To Review The Improper Actions of The Michigan Court Of Appeals

For the reasons set forth by Petitioner in his delayed application for leave to appeal from the Michigan Court of Appeals' decision reversing a jury verdict and judgment in his favor, as adopted and relied upon by Justices Michael F. Cavanagh and Marilyn Kelly of the Michigan Supreme Court,

Petitioner maintains that the majority of the Michigan Supreme Court have deprived him of his right to a jury trial. Beacon v. Theaters, Inc. v. Westover, 359 U.S. 500.

CONCLUSION

For these foregoing reasons, a writ of certiorari should be issued to review the final Order of the Michigan Supreme Court dated March 29, 2000.

Respectfully submitted,

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APPENDICES

APPENDIX A

ORDER
Entered: March 29, 2000

Michigan Supreme Court
Lansing, Michigan
Elizabeth A. Weaver,
Chief Justice

Michael F. Cavanagh
Marilyn Kelly
Clifford W. Taylor
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Justices

114848

MICHAEL D. GREGORY,

Plaintiff-Appellant,

v

SC: 114848
COA: 198382
Wayne CC: 86-627406-CZ

CINCINNATI INCORPORATED and ADDY-MORAND MACHINERY COMPANY,

Defendants-Appellees.

On order of the Court, the delayed application for leave to appeal from the February 23, 1999, decision of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Cavanagh and Kelly, JJ., would grant leave to appeals.

[SEAL] I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 29, 2000 [signed
Clerk

APPENDIX B

Court of Appeals, State of Michigan

ORDER

Michael D. Gregory v. Cincinnati Inc.	Mark J. Cavanagh Presiding Judge
Docket No. 198382	Martin M. Doctoroff
LC No. 86-627406 CZ	Henry William Saad Judges

The Court orders that plaintiff's motion for rehearing is DENIED.

Judge Cavanagh would grant the motion for rehearing.

A true copy entered and certified by Carl L. Gromek, Chief Clerk, on

[SEAL]

April 22, 1999 — Date

/signed/ — Chief Clerk

APPENDIX C

STATE OF MICHIGAN

COURT OF APPEALS

RECEIVED
Mar 01 1999

MICHAEL D. GREGORY,

Plaintiff-Appellee,

v.

CINCINNATI INC., and ADDY-MORAND MACHINERY CO.,

Defendants-Appellants

and

CRUM & FORSTER,

Intervening party.

UNPUBLISHED
February 23, 1999

No. 198382
Wayne Circuit Court
LC No. 86-627406 CZ

MICHAEL D. GREGORY,

Plaintiff-Appellee,

v.

CINCINNATI INC., and ADDY-MORAND MACHINERY CO.,

Defendants-Appellants.

No. 199691
Wayne Circuit Court
LC No. 86-627406 CZ

Before: Cavanagh, P.J., and Doctoroff and Saad, JJ

PER CURIAM

In this products liability case, defendants appeal as of right from the final judgment entered following a second jury trial.[1] The jury returned a general verdict against both defendants, finding plaintiff fifty-one per cent responsible for the accident. On appeal, defendants claim that the trial court erred in failing to grant a directed verdict or judgment notwithstanding the verdict, because each of plaintiff's claims suffer a failure of proof. We agree and reverse.

In a consolidated appeal, defendants challenge the trial court's award of mediation sanctions to plaintiff. Because we reverse the jury's verdict for plaintiff in the second trial, we also vacate the mediation sanction order. The issues raised in the consolidated appeal are therefore moot.

FACTS AND PROCEEDINGS

Plaintiff, a journeyman sheet metal worker, was injured in 1986 while operating a press brake owned by his employer, Sheet Metal Industries ("SMI"). The press brake was designed and manufactured in 1964 by Cincinnati, Inc., and distributed by Addy-Morand Machinery Company in the same year. The press brake is an industrial machine used to slowly bend and shape sheet metal. It is operated by use of a foot pedal that engages the clutch when a certain amount of pressure is exerted (here, at least 35 pounds of pressure), causing the top, or "ram," to come down upon the sheet to bend it. The area where the sheet metal is placed in preparation for bending is referred to as the "point of operation." *Gregory, 202 Mich App 474, 477; 509 NW2d 809 (1993), aff'd 450 Mich 1; 538 NW2d 325 (1995).* The press brake in this case is a general purpose press brake, which can be fitted with different types of dies, in order to make different kinds of bends or manipulations on the metal. Donald Wandling, a consulting engineer who testified as defendants' expert witness, testified that the press brake is not the same as a power press. Wandling explained that unlike a power press, the press brake is often used to shape large pieces of metal which may extend outside of the machine. The operator of the press brake often must manually

support the section of the metal piece that extends outside the machine. When the metal is bent by the press brake, the portion of metal outside the machine also moves as the piece changes shape. Power presses involve rapid, repetitive motions; press brakes are much slower and require greater involvement by the operator. Plaintiff did not offer evidence to rebut Wandling's testimony as to the differences between press brakes and power presses.

On the day before the accident, plaintiff had improperly bent some metal sheets. On the day of the accident, plaintiff inserted flattening dies into the press brake so he could remove the improper bends. Plaintiff was operating the machine when he dropped a piece of metal, reached down to retrieve it with his right hand, placed his left hand in the "point of operation," and inadvertently depressed the foot pedal, causing the machine to cycle. Plaintiff's left hand was crushed by the machine.

Plaintiff proceeded against defendants on his claim of negligent design. He contended that the manufacturer knew at the time of manufacture that press brakes pose a hazard of hand injury, and that the manufacturer was therefore obligated to ameliorate the hazard with an appropriate safety device. Plaintiff claimed that when the press brake was sold in 1964 it was well known that the principal hazard of the press brake was injuries to hands. Thus, plaintiff contended that the manufacturer and the seller should have included on the press brake one or more of the following:

(1) a foot pedal guard;

(2) a presence-sensing device such as a "light curtain" (similar to a laser beam or garage-door opener, which causes the machine to stop when the light path is broken);

(3) a barrier guard; or

(4) hand controls or "dual palm buttons."

Following plaintiff's close of proofs, defendants moved for a

directed verdict, claiming that plaintiff failed to sufficiently demonstrate the magnitude of risk of hand injuries. The court denied the motion, and proceeded to jury deliberations after defendants presented their proofs. The jury returned a verdict for plaintiff. Defendant then moved for judgment notwithstanding the verdict (JNOV) because of a failure of proof as to each of the four types of safety devices. Specifically, defendants contended that plaintiff failed to demonstrate that the proposed safety devices were both compatible with the press brake's functioning and available in 1964. Again, the trial court denied defendants' motion. The trial court subsequently awarded plaintiff mediation sanctions under MCR 2.403, based on a mediation evaluation made prior to the first trial.

No. 198382

I

Defendants contend that the trial court erred in denying their motion for JNOV. The standard of review for JNOV requires review of the evidence and all legitimate inferences in the light most favorable to the nonmoving party. Only if the evidence, so viewed, fails to establish a claim as a matter of law, should a motion for JNOV be granted. *Phinney v. Perlmutter*, 222 Mich App 513, 524-525; 564 NW2d 532 (1997). A motion for JNOV should be granted only when there was insufficient evidence presented to create an issue for the jury. *Pontiac School District v. Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 612; 563 NW2d 693 (1997), lv gtd in part 457 Mich 870 (1998).

Here, there was insufficient evidence for the jury to find that any of the four proposed safety devices was both available in 1964 and compatible with all of the machine's intended purposes. Relying upon *Owens v. Allis-Chalmers Corp.*, 414 Mich 413, 429-430; 326 NW2d 372 (1982), the Court in *Reeves v. Cincinnati, Inc.*, 176 Mich. App. 181, 187-188; 439 NW2d 326 (1989) set forth the elements necessary for a plaintiff to establish a prima facie case of design defect:

> [A] prima facie case of a design defect premised upon the omission of a safety device requires first a showing of the magnitude of foreseeable risks, including the likelihood of occurrence of the type of accident precipitating the need for the safety device and the severity of injuries sustainable from such an accident. It secondly requires a showing of alternative safety devices and whether those devices would have been effective as a reasonable means of minimizing the foreseeable risk of danger. This latter showing may entail an evaluation of the alternative design in terms of its additional utility as a safety measure and its tradeoffs against the costs and effective use of the product.

A plaintiff must therefore show: (1) the magnitude of significant and foreseeable risk; (2) that alternative safety devices exist, (3) that such alternative devices would be effective to minimize the foreseeable risk, and (4) that such alternatives would be practical, given the costs involved and the nature of the intended use of the product. See *Reeves*, supra.

Defendants raise specific arguments as to each of the four safety devices identified by plaintiff, and we review each potential device individually.

A. Pedal Guard

Plaintiff contends that the press brake was defective when it was manufactured and sold in 1964 because it did not incorporate a foot pedal guard. This argument fails as a matter of law. *Owens* held that courts "must look to the record to determine what showing was made that any of the proposed [alternative safety designs] would be compatible with the nature of [the] operator's work." *Owens*, 414 Mich. at 430. Defendants presented unrebutted testimony that the pedal guard would make performance of the job impossible. Dennis Cloutier, defendants' expert witness and project safety coordinator for Cincinnati, testified that it would be too awkward for the press brake

operator to come in at the side of the pedal under the guard and depress the pedal with his foot while simultaneously supporting the piece of metal to be bent. He explained that in order to press the pedal, you have to get the major part of your foot on the pedal, on the activating part, not just your toe. If you look at the geometry of the foot, and leg over the foot, you are not going to be able to put the entire portion oft he foot over the pedal without your shin coming into contact with the front end of the guard." Defendants' other expert, Wandling, testified that the different tasks performed on the press brake sometimes required the operator to approach the foot pedal from either side, and that a cover would make this impossible. Plaintiff offered no expert testimony or other evidence to rebut Cloutier's or Wandling's testimony; he offered no explanation as to how a foot pedal guard could be incorporated into the machine without interfering with the machine's operations or without limiting the machine's functions.

Furthermore, even if plaintiff had demonstrated that the foot pedal was a feasible safety device, plaintiff would still fail to establish that the absence of a pedal guard was the proximate cause of plaintiff's injury. *Auto Club Insurance Association v. General Motors Corporation*, 217 Mich. App. 594, 604; 552 NW2d 523 (1996). Defendants established that plaintiff's employer had fashioned its own foot pedal guard, but that the employees, including plaintiff, declined to utilize it (bolstering defendants' argument that the pedal cover interfered with the machine's operations). Accordingly, plaintiff failed to demonstrate that his injury was attributable to defendants' failure to include a foot pedal guard.[2]

B. Light Curtain

Next, plaintiff contends that defendants negligently designed this press brake in 1964 because they failed to include a presence-sensing device or "light curtain" which, when the light beam is broken, would automatically shut the machine off. JNOV should have been granted on this claim because plaintiff's proofs failed in two respects.

First, plaintiff failed to establish that light curtains were

available as a means of guarding press brakes in 1964. It is clear that a plaintiff bears the burden of proving the availability of a proposed safety device at the time of manufacture. See *Owens*, 414 Mich. at 427, n 4; *Reeves*; 176 Mich. App. at 187-188. Here, plaintiff's expert's testimony established only that a German company, Sic Optive, had developed and manufactured a light curtain before 1964. There was no testimony that a light curtain sensor was, in fact, available for use by American manufacturers of press brakes in 1964, and no rebuttal of defendants' evidence that the electronic wiring of the Sic Optive system failed to meet American standards in 1964. On this record, plaintiff has failed to show that his proferred "light curtain sensor" was "available."

Furthermore, plaintiff failed to meet his burden of showing that a press brake with a light curtain would function adequately to perform the jobs to be completed by plaintiff's employer. We must consider whether plaintiff established that the proposed safety feature was compatible with the operator's work. *Owens*, 414 Mich. at 430. The only evidence presented here by either party on this issue was the testimony of plaintiff's supervisor, who testified that use of such a light curtain would be incompatible with the operations of plaintiff's employer. In light of this unrebutted testimony, the trial court should have granted JNOV on this claim.

C. Barrier Guards

Plaintiff also claims that defendants were negligent by not designing the press brake with some type of barrier guard. This claim fails for the same reasons that the light curtain sensor claim fails; plaintiff has failed to present evidence to controvert plaintiff's supervisor's testimony that such guards would make operation of the brake presses "impossible" - an operator could not use a machine so equipped to accomplish all the tasks that the employer required. See also, *Bullock v. Gulf & Western*, 128 Mich. App. 316, 322; 340 NW2d 294 (1983)[3]; Cf. *Reeves*, 176 Mich. App. at 189-190. Defendants' expert, Wandling, also testified that a barrier guard would create an additional hazard to the operator because it would interfere with the movement of the piece of metal outside the machine when the

metal became bent.

D. Dual Palm Buttons

Plaintiff also contends that the press brake could have been designed with dual palm buttons which would have prevented the machine from engaging unless both of the operator's hands were safely outside of the machine. Plaintiff's expert testified that in 1964, it was possible to build a press brake which required the operator to use two outside hand controls to lower the ram far enough so that there was no longer a danger that the operator would accidentally put his hand in the point of operation. Once the ram was low enough, the operator could use his hands to support the metal and engage the foot pedal. However, defendants rebutted this evidence with testimony that dual palm buttons could not be incorporated into a general purpose press brake, although they might work on a special purpose construction brake. Furthermore, if the machine had two palm buttons, it would not be possible to control the speed or to "feather" the piece of metal. Plaintiff's witnesses never addressed these issues.

Even if a two-button model could have been integrated into SMI's operations, plaintiff's proofs would still fail because of evidence that cincinnati offered a two-button model for ale in 1964, which SMI declined to purchase. In *Owens*, supra, the Michigan Supreme Court recognized the principle that a manufacturer which offers a particular safety feature will not be held liable for design defect where a knowledgeable purchaser opted to but the product without that feature.[4] The plaintiff in *Owens* claimed that a forklift was defective because it did not include a cage enclosure to protect the driver in case of a rollover. The Court concluded that the claim was meritless as a matter of law:

> Significantly, the defendant did offer the cage enclosure, which was one of the suggested restraints, as an option. The question then becomes whether such a cage enclosure should have been installed as standard equipment. Although plaintiff's expert acknowledged that some drivers are frequently in and

> out of their vehicles, there was no testimony concerning the effects of a cage upon the driver's ability to perform his or her work. There also was no factual testimony concerning the safety of an operator in a cage enclosure in a rollover or in any foreseeable accidents or emergencies other than rollovers. *In short, we find no support in the record for the conclusion that the manufacturer, as opposed to the employer, would be in a better position to conclude that the cage enclosure should be installed as standard equipment.* [*Owens*, 431-432.]

Similarly, plaintiff her has failed to demonstrate that the dual palm buttons should have been installed as standard equipment. There was no factual testimony that this design would be fully compatible with SMI's operations. Accordingly, we cannot conclude that defendants, as opposed to SMI, was in a better position to conclude that the dual-palm buttons should have been installed on every press brake Cincinnati manufactured.

In sum, plaintiff failed to adduce the requisite proofs with respect to each of the proposed safety devices. Plaintiff therefore failed to establish all the elements of a design defect claim, and the trial court erroneously denied defendants' motion for JNOV.

II

Furthermore, the trial court should have granted defendants' motion for a directed verdict on all four claims of negligent design, because plaintiff failed to present evidence of the magnitude of the risk of similar injuries occurring with use of the press brake prior to 1964. *Owens*, supra at 429-430; *Petto v. The Raymond Corp*, 171 Mich App 688, 693; 431 NW2d 44 (1988). Plaintiff did present some evidence of injuries from power presses, rather than power brakes. However, this evidence is not satisfactory because power presses and power brakes function very differently, especially with respect to the nature of the operator's interface with the machine. Accordingly, we

do not believe that the evidence presented with respect to power presses was relevant to the magnitude of risk of injury from power brakes.

With respect to plaintiff's evidence on press brakes, namely documents authored by governmental and industry organizations prior to 1964, these documents merely stated that the press brake was a very dangerous machine and that the most common accident to press brake operators was hand and finger injuries. In our view, evidence showing merely that there was a risk of harm is insufficient to meet the plaintiff's burden to show what the risk of harm was (e.g., how frequently such incidents occurred, the extent to which the risk can be mitigated by adequate training).

In light of this disposition, we need not address the remaining issues.

No. 199691

In the consolidated appeal, defendants raise issues relating to the award of mediation sanctions. Because we have reversed judgment for plaintiff, we also vacate the mediation award. All issues raised in the consolidated appeal are therefore moot.

Reversed and remanded for judgment consisted with this opinion. We do not retain jurisdiction.

/s/ Martin M. Doctoroff
/s/ Henry William Saad

[1]This matter returns to our Court after remand. *Gregory v. Cincinnati Inc.*, 202 Mich App 474; 509 NW2d 809 (1993), aff'd 450 Mich 1, 6, 36; 538 NW2d 325 (1995).

[2]Plaintiff argues in his brief that SMI's pedal guard was not adequate, but he presented no evidence in support of this argument at trial.

[3]In *Bullock v Gulf & Western*, 128 Mich App 316, 322; 340 NW2d

294 (1983), the plaintiff was injured when the ram of his punch press came down on his hand while he was changing a broken punch. He claimed, in part, that a guard would have prevented the accident. The trial court granted a directed verdict for the defendant. We found the guard proffered by the plaintiff was available and feasible when the power press was manufactured, but:

> [B]ecause of the limitations imposed by the guarding devices, such a guard placed on the punch press before it is assembled into the entire system would turn what was intended as a multi-purpose punch press into a single-purpose press. The size, shape, and type of guard would have to be selected with the ultimate use of the metal forming system in mind. We agree that this would be an unreasonable burden to impose upon a manufacturer who has been "hired" to supply a multi-purpose press.

Defendants make a similar argument here, and on the record presented here, we find it persuasive.

[4]See 63A Am Jur 2d, Products and Liability, § 995, p 158, also *Scallon v Duriron Co*, 11 F3d 1249, 1253 (CA 5, 1994), and *Linegar v Armour of America, Inc*, 909 F2d 1150, 1154 (CA8, 1990).

STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL D. GREGORY,

Plaintiff-Appellee,

v.

CINCINNATI INC., and ADDY-MORAND MACHINERY CO.,

Defendants-Appellants

and

CRUM & FORSTER,

Intervening party.

UNPUBLISHED
February 23, 1999

No. 198382
Wayne Circuit Court
LC No. 86-627406 CZ

MICHAEL D. GREGORY,

Plaintiff-Appellee,

v.

CINCINNATI INC., and ADDY-MORAND MACHINERY CO.,

Defendants-Appellants.

No. 199691
Wayne Circuit Court
LC No. 86-627406 CZ

Before: Cavanagh, P.J., and Doctoroff and Saad, JJ

CAVANAUGH, P.J. (dissenting).

I respectfully dissent. I believe that the trial court correctly denied defendants' motion for directed verdict and judgment nothwithstanding the verdict. Although the majority does not reach this issue, I also believe that the trial court did not err in denying defendants' motion for remittitur of prejudgment interest.

In my opinion, plaintiff submitted sufficient evidence concerning the magnitude of the risks and the reasonableness of the proposed alternative designs. See *Reeves v Cincinnati, Inc*, 176 Mich App 181, 187-188; 439 NW2d 326 (1989). With regard to the magnitude of the risk, plaintiff presented numerous documents from governmental and industry organizations which stated that the press brake was a very dangerous machine and that the most common accidents to its operators were hand and finger injuries. Contrary to defendants' argument, a "showing of the magnitude of foreseeable risks," see id., does not require statistical evidence when, as here, there is sufficient evidence of the likelihood of this type of accident occurring.

In addition, plaintiff presented evidence of numerous recommendations by the government and the industry prior to 1964 that safety devices be built into the press brake to prevent such accidents. Plaintiff's expert testified that these safety devices were available in 1964 and would have been compatible with defendants' press brake. Thus, the trial court correctly denied defendants' motion for judgment notwithstanding the verdict because factual questions existed upon which reasonable minds could differ. See *Alar v Mercy Memorial Hosp*, 208 Mich App 518, 524; 529 NW2d 318 (1995).

Furthermore, I would uphold the trial court's decision to deny defendants' motion for remittitur as to prejudgment interest during the time of the first appeal of this matter. In defendants' previous appeal, the Supreme Court remanded the case for a new trial. Thus, defendants cannot be considered a prevailing party because they did not prevail *on the entire record* in their prior appeal. See MCR 2.625(B)(2).

I would affirm.

/s/ Mark J. Cavanaugh